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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND DELBERT THOMPKINS, Defendant and Appellant.	A152363 (Solano County Super. Ct. No. VCR223508)

Appellant Raymond Delbert Thompkins was originally charged with committing a lewd act on a single child under the age of 14 (Pen. Code, § 288, subd. (a).)[1] After the jury hung and a mistrial was declared, appellant was charged with three counts of committing that offense on not just the sole victim alleged in the first trial but also her two sisters. The jury acquitted appellant of count 1, the only offense he was originally charged with, but convicted him of counts 2 and 3, which alleged violations of section 288, subdivision (a), against the two other victims. The jury also found true three prior serious felony and prior strike conviction allegations, and the trial court sentenced appellant to 60 years to life in prison.

Appellant claims the convictions and prior strike enhancements must be reversed because (1) charging them constituted prosecutorial vindictiveness and (2) the erroneous admission of videotaped out-of-court interviews of the two victims denied him due process and his right to confrontation, and was prejudicial.

[1] All statutory references are to the Penal Code, except where otherwise indicated.

Rejecting both claims, we shall affirm the judgment.

STATEMENT OF FACTS[2]

The two victims who testified at trial, A.G., and T.C.—and J.G, the alleged victim of the sole offense originally charged, who had been declared incompetent to testify due to her age—are granddaughters of B.T., appellant's wife. B.T.'s daughter is the mother (Mother) of the three alleged victims. In February or March of 2015, Mother asked B.T. to temporarily take custody of her five children while she searched for housing. The three sisters, another sister,[3] and their brother lived with B.T. and appellant until April 18, 2015.

Tara Gulley testified that on the evening of April 18, 2015, after she and her husband finished a walk along the Vallejo waterfront and were approaching their parked truck, she noticed appellant sitting in a nearby car with his head laid back, his eyes closed, and a three- to four-year-old girl, later identified as J.G., sitting on his lap. He was "panting," had "sweat on him," and an expression of "pleasure" on his face; "it just didn't look right." After moving her truck to block appellant's car from leaving, Gulley walked up to appellant's car and saw that the little girl was holding appellant's penis and moving her hand up and down. She then called 911, described what she had seen and said that she had blocked appellant's car. While she was on the phone appellant and the little girl left the car and walked away, but they soon came back with three other children. After Gulley moved her truck, as instructed by the 911 operator, appellant and all four children entered appellant's car and he drove away.

Officer Jade McLeod, who responded to Gulley's 911 call, located and performed a traffic stop of appellant. One child was in the front passenger seat and three children were in the back. McLeod arrested appellant and later took a statement from Gulley. After reviewing the videotape of his interview with Gulley, Officer McLeod realized that

[2] This evidence was elicited at the retrial at which appellant was convicted.

[3] The fourth sister played no significant role in the events described in this opinion.

his report of the interview was erroneous in two respects. Gulley did not tell him that the car seat appellant was sitting on was laid back, nor did she say appellant's penis was erect. As instructed, McLeod took appellant to Kaiser Hospital in Vallejo for a sexual assault response team (SART) exam that was conducted there by Nurse Kari Cordero.

Nurse Cordero conducted a sexual assault examination of appellant using a "Woods lamp," which "fluoresces" (i.e., lights up) any DNA, although it can fluoresce other substances, such as semen or saliva. The Woods lamp lit up appellant's scrotum area. Cordero also used a Q-tip to swab appellant's mouth, penis and scrotum. Cordero deposited all of the evidence she collected in a sexual assault kit, which was later transported to the Richmond laboratory of the Department of Justice.

Heather Tomchick, a criminalist employed in the Richmond lab, conducted an analysis of the swabs taken from appellant and found semen present in both the penile and scrotal swabs.

At some point after appellant was arrested, J.G. was placed in the foster home of Kenneth Boyd and his wife, who had been foster parents for 17 years. Kenneth Boyd testified that J.G. had been in his home for "maybe a year or longer," and "frequently" exhibited "unusual behavior," such as "inserting toys into her vagina and touching her private parts with her own hands." He also would see her "humping on the bed," and "taking her clothes off in front of other children," and she had frequent tantrums. Caring for J.G. "got to be too much," he stated, because she required a higher level of care than he was paid for, so he gave up the placement.

Clinical Social Worker Stephanie Ladd testified that some of the behavior Kenneth Boyd described was not "developmentally normal." Asked whether it was "developmentally appropriate or common" for a five-year-old girl "to insert things into her vagina," Ladd stated that it is "usually a red flag" because "children learn based on what they have seen or experienced."

A.G., who was seven years old at the time of trial, testified that T.C. and J.G. were her sisters. When asked whether she had ever seen appellant, who she and her sisters called "Poppa Ray" or "Papa Ray," touch anyone in a way that was a bad touch?" she

answered "No." Asked did she "ever sit in Poppa Ray's lap?" she said "I don't know." Asked whether she remembered talking to a lady one day in a conversation that was videotaped she said "No." Asked "has Poppa Ray ever taken off your clothes?" she made no response. When the district attorney inquired whether "there is anything that would help you to be able to talk?" A.G. said "I don't know." At that point the court declared a brief recess.

When the proceedings resumed, defense counsel asked A.G. a series of questions regarding her past experiences with Starla and Leanne, who had apparently interviewed her during dependency proceedings or appellant's prior criminal trial, and statements she made to them, such as whether she remembered telling these two women "that Poppa Ray did not touch you" and that she told her mother that a Wendy had "told you to lie." A.G. did not remember those questions or much of anything else she was asked about. However, when asked by the district attorney on redirect whether she had been "telling the truth here today?" A.G. said "Yes" and said "no" when asked whether she was "telling any lies here today." At that point, the court initiated a conversation with A.G. establishing that she was "uncomfortable" and did not want to talk "about good touches and bad touches." The court then asked counsel "can we allow [A.G.] to leave?" and both answered "yes."

Over objection, the district attorney was permitted to play a videotaped interview with A.G. that took place about two years earlier, when she was five years old. A.G. stated in the interview that when she was in the bathroom brushing her teeth her grandfather touched her private part and her behind over her clothes. At another time he touched her "private part" while she was in her bedroom. At that time he pulled down her pants but not her underwear. Appellant's skin did not touch A.G.'s skin. When A.G. told appellant she did not want him to touch her "body parts" he said "no." He also told her "don't tell anyone" and A.G. did not. A.G. considered what appellant did to be "bad." A.G. said she saw appellant touch T.C.'s body part over her clothes when T.C. was in the bathroom. When asked whether what "Papa Ray" did was good or bad, A.G.

answered "bad." Asked whether appellant ever asked her to touch his body parts, A.G. answered "no."

Nine-year-old T.C.'s testimony under oath was perhaps even more evasive than that of A.G., so that she too was excused and the court also allowed into evidence her previously videotaped interview.

In that interview, which took place shortly after appellant was arrested two years earlier when she was 7 years old, T.C. stated that on a Sunday when her grandmother was still in bed, she was sitting in a rocking chair in the living room when appellant told her to get up. When she moved to the couch, appellant followed and did not stop when she told him to. He tried to touch her in her "private, in the back, B-U-T-T" with his hand under her clothes. He also pinched her nipples once (which the interviewer referred to as "nip-nips"). A.G. also said appellant touched her inside a "private" she described as the "middle" and a "different place" than her butt. Appellant did not stop when she told him to, but "kept doing it." When he finally stopped, T.C. got up and told her grandma and "[s]he told him to stop" and "[t]hen he did." T.C. was six when this happened.

T.C. also stated that she had seen appellant touch J.G.'s butt with his hand under her clothes, and A.G.'s "private part." J.G. had told T.C. that appellant "put his hand in her private, her front and . . . her back." T.C. also said she saw appellant put his hand in J.G.'s tights, and his hand was "[g]oing all over the place." J.G. said nothing at the time but later told T.C. that Papa Ray "kept digging in back and in the front." On the occasion that T.C. saw appellant put his hand in A.G.'s privates, appellant told her not to tell her grandmother, because "he didn't want her to know." Appellant said he would "ground me and whoop me" if she told her grandmother, but she told her anyway because "I didn't wanna keep a secret."

B.T., appellant's wife and the grandmother of J.G., A.G., and T.C., testified that at the time the three girls were living in their home, appellant was working at the Gap in San Francisco and would be gone from 4:00 in the morning until 6:00 or 7:00 at night. Every Saturday she took the family to church and would never leave her grandchildren at home. Mother visited them "practically seven days" a week.

After the family returned home from church on April 18, 2015, the children asked appellant to take them to the waterfront to feed the birds. Appellant took them there and during that time talked to B.T. on the phone for 30 minutes.

B.T. denied T.C. ever told her that appellant had touched her or any of the other girls. She also stated that her granddaughters did not use the phrase "private parts" but instead called such bodily parts "punani." B.T. again denied that appellant was ever home alone with her grandchildren.

Mother of the three alleged victims, testified that during the time the children stayed at B.T.'s home she visited them there every day in the morning before school and in the afternoon after school, and appellant was never present. B.T. (grandmother of the three alleged victims) always took the children with her when she went to church on Saturday or anywhere else unless Mother was with them; she would not leave the children in appellant's care because "he wasn't trustworthy."

T.C. and A.G never used the term "private parts" Mother stated, but called those parts of their body "kit-kit." Neither T.C., J.G. nor A.G ever told her they had been touched by appellant. When Mother asked one of them—it was either A.G. or T.C but she could not recall which one—why she stated in the taped interview that appellant had touched her, she said that the social worker, Wendy, "told me to say it." Mother continued to visit her daughters after they were placed in foster care. J.G. was placed in three different homes. During the time she was at Kenneth Boyd's foster home "she was hitting me. Which is not her at all. She was really violent towards her sisters and brother." And there were "reports that she was taking off her underwear and throwing them on the ground in the back yard and touching other little kids inappropriately and, yeah, that sort of stuff."

Mother stated that she was going to court to get reunification services but denied there was any danger of losing her parental rights. She admitted she "hated" certain social workers because "[t]hey took my kids." Asked whether she remembered having a discussion with Social Worker Wendy Smith in which "she asked you what it would mean to you if the girls had disclosed abuse to Wendy Smith, and you said it would mean

that you failed and you weren't as close to the girls as you thought?" Mother denied that that was what she said. What she had said was, "I'm confident in my relationship with . . . all four of my daughters. And I was willing to bet money that if anything had ever happened, they would tell me. I would be the first person to know."

Latoya, a cousin of J.G., A.G., and T.C., testified that when T.C. was in foster care, she asked Latoya, "when do I get to go home?" After Latoya said she did not know, T.C "said she was lying about something, but she never—she wasn't specific about what she was lying about."

The girls' brother, who was 11 years old at the time of trial, remembered going to the Vallejo waterfront with appellant two years earlier on April 18, 2015 to feed the birds. He thought three of his four sisters went with them but was then unable to remember which ones. He did remember that when he returned to their car he saw that J.G. was asleep and appellant was playing a game on his phone.

Wendy Smith was a social worker assigned by Solano County Child Welfare Services to investigate a dependency proceeding involving J.G., A.G., and T.C. She met with them 10 to 20 times prior to the time of their videotaped interviews, which she did not attend. However, she did not discuss the events that allegedly took place at the waterfront on April 18, 2015, until June 30, about 72 days later. At that time, the children were aware of the allegations against appellant but had made no statements regarding them. When Smith began discussing the allegations (i.e., the allegations of Gulley about what happened on April 18, 2015), "the girls began to disclose beyond what was initially disclosed." When she asked if the alleged conduct of appellant only happened one time on April 18, and only to J.G., the children indicated it happened more than one time and to others beside J.G.

Kwanda Sylvester, a Solano County social worker assigned to the three girls in October 2015, never saw J.G. act out "sexually." Though she had been placed in at least three different foster homes, Kenneth Boyd was the only foster parent who ever expressed concerns about J.G. acting out sexually during the four or five months Sylvester was assigned the girls.

Dr. William O'Donahue, a professor of clinical psychology at the University of Nevada who specializes in child sex abuse, spent 10 hours reviewing 25 documents regarding appellant and the allegations against him in this case, and testified about the manner in which unintended suggestive influences can cause false memories and false accusations. Dr. O'Donahue testified, for example, that "[w]ith young children three, four, five, if you ask repeated questions, if you ask leading questions, if you do conformity press[,] which is 'Bobby said this; Suzie said this,' the rates can be 50, 60, 70, 80 percent of children will form a false memory. Because, again, the basic notion is that it's almost the job of children to be suggestible."

DISCUSSION

I. *The Claim of Prosecutorial Vindictiveness Is Without Merit*

Appellant claims the prosecutor's addition of two new charges and new prior strike allegations in the second case constituted prosecutorial vindictiveness.

A. *The Prior Proceedings*

The facts pertinent to appellant's claim of prosecutorial vindictiveness all took place prior to the retrial just discussed. The sequence in which events took place is essential to our legal analysis.

On April 21, 2015, the Solano County District Attorney filed a complaint (in case No. VCR223508) charging appellant with committing a single count of lewd acts (§ 288, subd. (a)) upon J.G, a child under 14 years of age, on April 18, 2015, and alleging appellant had suffered three prior serious felony convictions (§ 667.5, subd. (a)(1)).[4] At a preliminary hearing held on June 16, 2015, appellant was held to answer for that offense. Gulley, the witness who observed and reported appellant's conduct to the police, testified at the preliminary hearing.

On June 19, 2015, an information was filed in the case alleging the same single count charged in the complaint. As in the complaint, the prior serious felonies were

[4] The prior convictions—one for kidnapping (§ 209, subd. (b)) and two for robbery (§ 211)—all took place in the Alameda County Superior Court on March 28, 1991.

alleged only in connection with section 667.5, subdivision (a)(1), which imposes a five-year enhancement for the commission of a second serious felony. It was not alleged that the prior felonies subjected appellant to punishment under the three strikes law.

On the eve of trial, which had been set for August 5, 2015, appellant sought a continuance to allow counsel time to review discovery belatedly provided by the People. The trial date was reset for April 6, 2016, eight months later, and that date was confirmed at a readiness conference on March 7, 2016, at which plea bargaining took place in the trial judge's chambers.[5]

On March 21, 2016, due to a conflict with another scheduled trial, the prosecutor moved for another continuance and trial was reset to for May 25.

On May 23, 2016, two days before trial was scheduled to begin, the prosecutor requested still another continuance and trial was reset for June 2. On May 31, appellant moved for further discovery. The parties filed formal motions in limine, which were heard on May 31.

On June 2, 2016, the day last set for the commencement of trial, 12 jurors and 2 alternates were finally selected and sworn.

On June 3, 2016, prior to the commencement of trial then scheduled for June 9, the prosecutor moved "to amend the information to allege defendant's strike prior," specifying a "strike prior from 1991 for kidnapping and robbery."[6] The motion stated

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[5] What happened or did not happen at the March 7 settlement conference is crucial to this appeal. As will be seen, the presumption of prosecutorial vindictiveness we are asked to apply is inapplicable where the challenged prosecutorial conduct resulted from the defendant's rejection of a plea agreement proposed by the prosecution during the plea bargaining process. The parties to this appeal advance conflicting views as to whether, as the trial court found, that is here the case. We shall describe the plea negotiations between the parties that took place on March 7, 2016 later, after first discussing the applicable law. However, we must first describe the events that took place after the March 7 conference and before the retrial.

[6] The "strike priors" alleged pursuant to section 1170.12, subdivisions (a)-(d) and 667 (b)-(i) were the same offenses previous alleged as serious felonies pursuant to section 667, subdivision (a)(1)—namely, one count of kidnapping (§ 209, subd. (b)) and two

that "[i]t is unclear why the strike prior was excluded from the information. It appears to be an oversight since an enhancement based on that same prior was alleged in the information. The court then adjourned the proceedings and directed jurors to return on June 9.

On June 8, 2016, appellant filed a non-statutory motion to dismiss the information "for due process violation and for prosecutorial misconduct" in delaying commencement of trial and refusing to disclose evidence that could be used to impeach Gulley, who assertedly saw appellant commit the charged offense on April 18, 2015. On June 9, 2016, appellant moved to dismiss the information on the additional ground that the destruction or unavailability of a document containing the exculpatory statement of Gulley violated his due process right to a fair trial for the reasons set forth in *California v. Trombetta* (1984) 467 U.S. 479 and *Arizona v. Youngblood* (1988) 488 U.S. 51.

The court refused to rule immediately on the two motions to dismiss, ordered the trial continued, and inquired of the jurors previously selected and sworn whether they could return at a future date. Because of the unavoidability of a sufficient number of jurors, the court declared a mistrial.

On July 6, 2016, the court granted the People's unopposed motion to amend the information to specify that a prior felony conviction subjected appellant to the "Three Strikes" law.

On July 20, 2016, a second jury was sworn in case No. VCR223508 and the case proceeded to trial. Two days later, the jury announced it was unable to reach a verdict and the court declared a second mistrial. According to a statement of defense counsel the prosecutor did not dispute, the jury voted 10 to 2 for acquittal.

On August 9, 2016, the People filed a complaint in a second case (No. VCR227210), charging appellant with *two* counts of lewd acts on two newly alleged victims, A.G. and T.C., who, as noted, are J.G.'s sisters. The district attorney advised

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counts of robbery (§ 211)—all of which convictions took place on April 28, 1991, in Alameda County.

the court that although the new complaint did not allege the prior strikes alleged in the amended information, he intended to consolidate appellant's two cases "and the prior strike and a five-year enhancement, as has already been alleged in [case No.] 223508," would continue to operate. After defense counsel remarked that the district attorney "can do that at any time. He doesn't need our approval to do that," the court stated: "That's fine. If both parties agree that that's possible." When the court inquired whether the parties were "deeming the complaint an Information?" the district attorney and public defender agreed they were, and appellant waived his right to a preliminary hearing, stating, "I will deem the complaint an information per your request," the court arraigned appellant on the consolidated information. On November 10, the court granted the People's motion to consolidate case Nos. VCR227210 and VCR223508.

On November 21, 2016, the People moved to amend the consolidated information. Among other things, the motion stated that appellant "had been facing two separate cases: VCR223508 and VCR227210. Case No. VCR223508 went to trial but the jury hung and the court declared a mistrial. The information in that case alleged three prior strikes and a charged strike. During plea negotiations before trial, the people had warned that if they were unsuccessful in securing a guilty verdict they would bring additional charges and seek a life sentence.

"After the jury hung, the People filed case No. VCR227210 and moved to join the cases. On November 10, 2016, the court granted the People's motion to join case Nos. VCR223508 and VCR227210."

In the November 21, 2016 motion, the prosecution moved to further amend the amended consolidated information "to allege [a] strike prior." The motion states that the initial case (No. VCR223508) "went to trial but the jury hung and the court declared a mistrial. The information in that case alleged three prior strikes and a charged strike. During plea negotiations before trial, the People had warned that if they were unsuccessful in securing a guilty verdict, they would bring additional charges and seek a life sentence. After the jury hung, the People filed VCR227210 and moved to join the cases. On November 10, 2016, the court granted the People's motion to join cases

VCR223508 and VCR227210. Now the People are moving to amend the language to make it clear that they are seeking a life sentence under the three strikes law."

When the court inquired whether the proposed amendment "add[s] new people, new victims?" the district attorney stated that it did not, "[i]t simply adds an extra paragraph making it clear that we are pursuing [a] three strikes penalty in this case. The priors have already been alleged since the very beginning, and we had invoked the two-strikes law." When defense counsel was asked whether appellant objected to the motion to amend she said "no" but then said "I should take that back, your Honor. Given that they are alleging—that this is a three strikes case, the underlying offenses, I believe they are from one course of conduct. So, of course, I would object on that ground . . . ."

The court granted the request to amend. As material, the amendment stated that appellant "has been convicted of the following two or more serious and/or violent felonies, as defined in Penal Code section 667(d) and . . . section 1170.12(b)," and identified appellant's three prior strikes. The amendment added that "Furthermore, Counts ONE, TWO, AND THREE is [*sic*] a serious and/or violent felony thus subjecting the defendant to sentencing pursuant to the provisions of Penal Code section 667(b)-(j) and Penal Code section 1170.12."

On December 2, 2016, the district attorney moved to further amend the amended consolidated information to correct specified "miscellaneous language" and to add an allegation that the three charged offenses were committed against multiple victims. Relying upon the doctrine of vindictive prosecution, appellant opposed the motion. The opposition described the somewhat confusing history of the proceedings as follows:

"[O]n April 21, 2015, the prosecution filed a complaint against Raymond Delbert Thompkins alleging that he committed one crime of lewd act upon a child on or about April 18, 2015, inclusive of an enhancement pursuant to Penal Code section 667(a)(1) (commonly known as a nickel prior), a total exposure of thirteen (13) years. There were several on and off the record discussions regarding the prosecution's decision to charge the enhancement pursuant to Penal Code section 667(a)(1) 'the nickel prior' and not the enhancement pursuant to Penal Code section 1170.12(a) through (d) and 667(b) through

(i) (commonly known as a strike prior). In fact, when the court inquired, the prosecution expressly stated on the record a colleague charged the case, not he himself and made no further remarks about adding a strike prior. On June 2, 2016, the trial commenced with no amendments to the complaint. On June 9, 2016, a mistrial was declared. The case was subsequently reset for trial to commence on July 29, 2016. On July 6, 2016, an amended complaint was filed by the prosecution adding the enhancement pursuant to 'the strike prior' Penal Code sections 1170.12(a) through (d) and 667(b) through (i); thereby increasing the exposure to 26 years. [Appellant] was duly arraigned and trial proceeded on July 20, 2016. On July 22, 2016, the jury was deadlocked and another mistrial was declared. Trial was reset time not waived, a last day of September 20, 2016. The matter was again on calendar on August 8, 2016, for setting of trial. On August 9, 2016, a felony complaint, case No. VCR227210, was filed alleging a new case of two counts of lewd conduct upon a child. Count 1 was alleged to have happened on or about and between October 22, 2013 and October 21, 2014. Count 2 was alleged to have happened on or about and between March 3, 2014 and March 3, 2015. The maximum exposure in this case was 16 years. There were no enhancements alleged. It should be noted, the allegations of the new case were known to the prosecution shortly after the filing of the original case, VCR223508 dated April 21, 2015. Nevertheless, it wasn't until after there were two mistrials in VCR223508, and one of which resulted in a divide of 10-2 for not guilty, did the prosecution elect to charge the new case, VCR227210. The prosecution waited approximately one year and four months to file case No. VCR227210. On November 21, 2016, the prosecution moved to consolidate both VCR223508 and VCR227210."

In response to appellant's opposition to the motion to amend and his claim of prosecutorial vindictiveness, the district attorney argued that "vindictive prosecution only exists if the People seem to increase defendant's punishment *specifically in response to his decision to have a new trial*. That was not the case here. Even before the jury hung during the first trial, the People had already alleged that defendant suffered prior strikes sufficient to warrant a life sentence—the requested amendment in the motion is simply a

re-wording to ensure that the charging document complies with uniform charging language. [¶] Moreover, it is not vindictive prosecution to await the outcome of one case, then file new charges based on distinct criminal activity unrelated to the conduct in the previous case. That was the situation here: the People tried defendant as to a single victim, then they added additional charges based on two more victims after the People failed to secure a conviction in the first case." The district attorney further stated that "the parties discussed settlement options with the court and the existence of possible charges against defendant based on two additional victims," but "were unable to reach a resolution."

The court found no prosecutorial vindictiveness and granted the People's motion to amend.

B. *Legal Analysis*

The Standard of Review

As the Attorney General points out, and appellant appears to agree, the California Supreme Court has not articulated the standard of review for a vindictive prosecution claim.[7] The parties also agree, as we do, that the issue presents a mixed question of law and fact. The usual practice for review of mixed question determinations affecting constitutional rights is to subject the ruling under consideration to independent review. (*People v. Cromer* (2001) 24 Cal.4th 889, 901.) Accordingly, we shall accept the relevant facts found by the trial court where supported by substantial evidence and subject to independent judgment the trial court's legal determination that such facts do not establish prosecutorial vindictiveness.

The Relevant Law

"The constitutional protection against prosecutorial vindictiveness is based on the fundamental notion that it 'would be patently unconstitutional' to 'chill the assertion of constitutional rights by penalizing those who choose to exercise them.' " (*In re Bower*

[7] In *People v. Ayala* (2000) 23 Cal.4th 225, 229, the Supreme Court concluded that the trial court's ruling that the evidence did not show prosecutorial vindictiveness was sound "under any standard of review."

(1985) 38 Cal.3d 865, 873 (*Bower*), quoting *United States v. Jack*son (1968) 390 U.S. 570, 581.) The defendant in *Bower* was originally charged with second degree murder. However, after he had exercised his right to a fair trial by successfully moving, based on prosecutorial error, for a mistrial, the prosecutor increased the charge on retrial to first degree murder. Finding "a reasonable likelihood of vindictiveness" due to the prosecution's "obvious institutional interest in avoiding the duplication of effort and increased expenditure of resources attendant on the retrial of such a case," the *Bower* court applied the presumption of vindictiveness, which "protects against the danger that such institutional pressures might subconsciously motivate a prosecutorial response to a defendant's motion for mistrial made at this late stage in the proceedings." *(Bower*, at p. 877, citing *Thigpen v. Roberts* (1984) 468 U.S. 27, 31 and *United States v. Goodwin* (1982) 457 U.S. 368, 376, 377, 383.) "The presumption also aims to free the defendant of the apprehension that the exercise of a right designed to guarantee that his or her trial is fair will be met with a retaliatory increase in the charge and potential period of incarceration to which he or she is subjected." (*Bower*, at pp. 877–878.)

Bower relies heavily on the earlier Supreme Court opinion in *Twiggs v. Superior Court* (1983) 34 Cal.3d 360 (*Twiggs*). In *Twiggs*, the prosecution moved to amend the information to add five prior felony conviction allegations shortly after the defendant refused an offered plea bargain after a mistrial and invoked his right to a retrial. The court applied the presumption of vindictiveness because no new facts were developed at trial which could have legitimately caused their addition, the prosecution made no efforts to verify the prior convictions despite knowledge of them prior to the first trial, and the prosecution demonstrated no interest in charging them until the defendant had insisted on a new trial. Once such a presumption arises, *Twiggs* holds, "the prosecution bears a heavy burden of rebutting the presumption with an explanation that adequately eliminates actual vindictiveness." (*Id*. at p. 374.) "The prosecution should be required to show that facts that would legitimately influence the charging process were not available when it exercised its discretion to bring the original charges." (*Ibid*.) As the proposition was stated in *Bower*: "In order to rebut the presumption of vindictiveness, the prosecution

must demonstrate that (1) the increase in charge was justified by some objective change in circumstances or in the state of the evidence which legitimately influenced the charging process and (2) the new information could not reasonably have been discovered at the time the prosecution exercised its discretion to bring the original charge." (*Bower, supra,* 38 Cal.3d at p. 879.)

Bower and *Twiggs* both also make clear that the presumption of vindictiveness derives from "the timing of the prosecutor's actions," an objective factor, and not from the actual motive of the prosecutor. (*Bower, supra,* 38 Cal.3d at pp. 875, 878; *Twiggs, supra,* 34 Cal.3d at pp. 368, 372–373.) Citing the seminal opinions in *Blackledge v. Perry* (1974) 417 U.S. 21, 28 (*Perry*) and *North Carolina v. Pearce* (1969) 395 U.S. 711 (*Pearce*), our Supreme Court emphasized that courts "have consistently refused to attempt to ascertain the subjective intent of the prosecutor." (*Bower,* at p. 878.) "[T]he lack of evidence that the prosecution acted maliciously or in bad faith" in increasing the severity of the offenses is unimportant, as "actual retaliatory motivation need not be shown. Rather, due process dictates that a defendant may not be deterred from exercising his constitutional right to attack his conviction by the possibility of prosecutorial retaliation." (*Twiggs,* at p. 369, citing *Perry,* at p. 27.) " '[T]he mere *appearance* of vindictiveness is enough to place the burden on the prosecution.' " (*Twiggs*, at p. 371, quoting *United States v. Ruesga-Martinez* (9th Cir. 1976) 534 F.2d 1367, 1369.)

Moreover, "[t]he same considerations that led the high court to condemn such prosecutorial conduct in the context of a postconviction appeal are applicable when the defendant asserts his right to a retrial after a mistrial. As a prosecutor would have a considerable stake in discouraging appeals requiring trials de novo, so too would the prosecution in a case such as this have a great interest in discouraging defendant's assertion of a retrial, particularly since the prosecution was unable to obtain a conviction in the first trial. Here, the defendant has endured a trial and a mistrial due to a hung jury, and when he asserts his right to a jury retrial rather than plead guilty and accept a prison term, he is faced with the possibility of a greater punishment than he would have received if the prosecution had secured a conviction, apparently as a result of pursuing his right to

be tried by a jury on retrial. Such a situation calls for invoking the prophylactic rule enunciated in *Perry* to protect against both the possibility that defendant will be deterred from exercising a legal right, as well as the danger that the state might be retaliating against the defendant for maintaining his innocence and facing a retrial." (*Twiggs, supra*, 34 Cal.3d at pp. 369–370.)

Twiggs also recognizes that the post *Perry* opinion of the United States Supreme Court in *Bordenkircher v. Hayes* (1978) 434 U.S. 357 (*Bordenkircher*) exempts from the presumption of vindictiveness prosecutorial threats of more severe charges that are made during pretrial plea negotiations. As we have said, the issue in this case turns heavily on whether the prospect of more serious charges was presented to appellant as part of a bargain proposed by the prosecution during pretrial negotiations.

The People's position in this appeal relies heavily on *Bordenkircher, supra,* 434 U.S. 357, which stands for the proposition that a prosecutor may carry out "a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged." (*Id*. at p. 358; accord, *United States v. Goodwin* (1982) 457 U.S. 368.) Hayes, the defendant in *Bordenkircher*, was charged with uttering a forged instrument, which was punishable by a term of 2 to 10 years in prison. After he was arraigned, his defense counsel met with the prosecutor who offered to recommend to the court a 5-year term if Hayes would plead guilty and also said that if Hayes did not he would seek an indictment under the habitual offender statute, which would subject Hayes to a mandatory sentence of life imprisonment due to his two prior felony convictions. Hayes chose not to plead guilty, and the prosecutor obtained an indictment under the habitual offender statute. It was not disputed that the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual offender law. A jury found Hayes guilty on the charge of uttering a forged instrument and, in a separate proceeding, found that he had twice before been convicted of felonies. As required by

the habitual offender law, Hayes was sentenced to a life term in prison. (*Bordenkircher*, at pp. 358–359.)

The Kentucky Court of Appeals rejected Hayes' constitutional claims, finding that the prosecutor's decision to indict him as a habitual offender was a legitimate use of leverage in the plea bargaining process. After a federal district court denied habeas corpus relief, the Sixth Circuit reversed, concluding that the prosecutor's conduct during the bargaining negotiations had violated the principles of *Perry, supra*, 417 U.S. 21. (*Bordenkircher, supra*, 434 U.S. at pp. 359–360.) The Supreme Court reversed the Sixth Circuit.

As the high court explained, in cases such as *Pearce, supra*, 395 U.S. 711 and *Perry, supra*, 417 U.S. 21, "the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation 'very different from the give-and-take negotiation common in plea bargaining between the prosecution and the defense, which arguably possess relatively equal bargaining power.' [Citation.] The Court has emphasized that the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right [citation], but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction. [Citation.] To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort [citation] and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' [Citation.] But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." (*Bordenkircher, supra,* 434 U.S. at p. 363.)

The court pointed out that "[p]lea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial. [Citation.] Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to

prosecutorial persuasion, and unlikely to be driven to false self-condemnation. [Citation.] Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial. [Citations.] [¶] While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible— 'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' [Citation.] It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." (*Bordenkircher*, at pp. 363–364; accord, *People v. Jurado* (2006) 38 Cal.4th 72, 98 ["It is not a constitutional violation . . . for a prosecutor . . . to threaten to increase the charges if the defendant does not plead guilty"].)

The Contentions of the Parties

Appellant argues that vindictive prosecution is shown by the fact that the prosecution both added the two new counts involving two new victims and alleged the prior convictions as strikes only *after* appellant exercised his right to a retrial after the prior trial resulted in a hung jury.

To establish that the prosecution did not act in retaliation for appellant's decision to exercise his right to a retrial, the Attorney General relies on the district attorney's declaration in support of his motion to amend, which the trial court impliedly credited.

As earlier noted, in that declaration, the prosecutor stressed the decision making that took place during the plea bargaining carried out in chambers on March 7, 2016.

The declaration stated that "[o]n or about March 7, 2016, I met in chambers with Solano County Superior Court Judge Robert Bowers and defense counsel," and had

"specifically noted during these discussions that there were two additional victims that would justify additional charges against defendant or could be used in the pending trial under Evidence Code section 1108. [¶] I explained that at that point I would be proceeding without alleging additional counts relating to two other victims; however, the court and I urged counsel to resolve the case as charged because there were potential additional charges and multiple ways to achieve a life sentence against defendant given his priors and the two other victims. [¶] Because the plea negotiations in chambers were unsuccessful, I filed the Amended Information on July 6, 2016, alleging that defendant had suffered three prior strike offenses, which I believed left me the option of pursuing a life sentence if I chose. [¶] I proceeded to trial in case VCR223508 as charged in part because I believed that including the allegations in VCR227210 would present the jury with a more complex, difficult set of facts to unravel, especially since VCR223508 involved an independent, reliable eye witness that would allow me to avoid having a young child testify, whereas VCR227210 involved numerous other instances of abuse with varying degrees of specificity. [¶] Had I included the charges from VCR227210 in the first trial, child witnesses would have to testify and be subject to impeachment [and], among other things, one of them had purportedly recanted, and there would have been additional witnesses, thus complicating the trial;" "[m]y decision was based . . . on my pre-trial negotiations with [defense counsel] and my indication that I would seek the additional charges and punishment should the case fail to resolve before the first trial or should I fail to secure a conviction during the first trial."

Agreeing with the prosecution that the challenged amendment was sought by the prosecution as the result appellant's rejection of the offer made to him on March 7, the court rejected the allegation of vindictive prosecution. The court stated its recollection of discussing that appellant "was originally charged with one 288 with a four-year-old child with a civilian witness. [¶] The People had or were developing some additional victims that they thought they could charge. And it was the court's sense or idea conveying to both parties but specifically to the defense that if they could get out of this with some sort of plea with some sort of number, perhaps that would satisfy the People and they would

not move forward on the additional children. [¶] . . . [¶] So now the People have at their disposal the opportunity to use the law, the Evidence Code to, one, either re-try him for the one kid and bringing in the other uncharged acts of misconduct, or file those other cases, which the law, again, allows them to be consolidated. Same type of crimes. Same victims. Same type of victims."

Appellant, who was at all times represented by competent counsel who vigorously protected his interests, must be deemed to have been fully informed of the consequences of rejecting the plea bargain offered by the prosecutor on March 7, 2016. On the one hand, he knew his priors were not merely serious felonies but qualified as strikes justifying the imposition of a life sentence, which the Prosecutor explicitly indicated he might seek. On the other hand, appellant must also have known that, due to her age, J.G. would probably be found incompetent to testify, and that the videotaped interview of her was not inculpatory. Given that the "additional victims" the prosecutor said he might charge were obviously A.G. and T.C., appellant's wife's grandchildren, and part of his family, appellant knew this new evidence might be used to support additional charges, but he must also have been aware of the children's increasing unwillingness to testify against "Poppa Ray," or to do so effectively.[8] Additionally, there were also signs that Gulley, the principal prosecution witness of the offense involving J.G., might be impeachable.

Nothing in the record indicates it would be unreasonable for us to assume, as we do, that, after weighing the competing considerations with the assistance of able counsel, appellant rejected the plea bargain offered by the prosecutor with full knowledge of the risk that eventually materialized: the imposition of a life sentence. (See *Bordenkircher*, *supra*, 434 U.S. at p. 360.)

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[8] We also observe that the possibility A.G. and T.C. would provide new evidence justifying additional criminal charges was "an objective change in circumstances" that "legitimately influenced the charging process" (*Bower*, *supra*, 38 Cal.3d at p. 879), but the initial uncertainty whether those two children would testify against appellant justified the delay in deciding whether to charge the offenses involving them until after the mistrial due to the hung jury.

Moreover, with respect to appellant's claim that the prosecution did not allege the prior convictions as strikes until the retrial, the record belies that assertion. As we have related, the original information alleged three prior serious felonies, without any allegation that would justify a life sentence. However, on June 3, 2016 (the day after the first jury was sworn), the prosecution filed a motion to amend the information to allege that the priors originally alleged pursuant to section 667, subdivisions (a)(1), (which also qualified as strikes) were additionally alleged as strikes pursuant to sections 667 subdivisions (b)-(i), and section 1170.12, subdivisions (a)-(d).

In support of this amendment, the prosecutor represented to the court that the omission of the prior strike enhancement allegation "appears to be an oversight since an enhancement [for a serious felony] based on that same prior was alleged in the [original] information. In any event, the defense should not be surprised by the prior given that defendant was on parole for it when the current case was filed. The defense also had defendant's RAP sheet (reflecting the prior conviction) since this case was filed over a year ago. The People's failure to add the strike actually benefitted the defendant since it allowed him to plea open to the court without having to suffer the additional penalty from the strike prior. And defendant will have time to contest the prior if it [*sic*] chooses. Finally, no other prior felony convictions have been charged, and the jury has not been discharged."

The court granted this unopposed motion to amend to add the prior strike enhancement allegation on July 6, 2016, well before declaring a mistrial due to the hung jury. Thus, appellant is simply mistaken in his claim that the prior strike enhancement was not alleged until after he exercised his right to a retrial.

The Attorney General's reliance on *Bordenkircher, supra*, 434 U.S. 357 is justified, as the circumstances of the case are similar to those here. As the Supreme Court said, while the prosecutor in *Bordenkircher* did not finally initiate the actions necessary to expose the defendant to the more severe sentence until after settlement discussions had ended, "his intention to do so was clearly expressed at the outset of the plea negotiations. [The defendant] was thus fully informed of the true terms of the offer

when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor *without notice* brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." (*Id*. at p. 360.) Thus, as the *Bordenkircher* court stated, as a practical matter, "this case would be no different" if the People had charged appellant with the additional victims and priors necessary to produce a life sentence "from the outset, and the prosecutor had offered to drop [those charges] as part of the plea bargain." (*Id*. at pp. 360–361.)

As our Supreme Court has reiterated, "[d]ue process does not prohibit the possibility of increased punishment in all cases of retrial after appeal" (or, it might also be said, after a hung jury), " 'but only those that pose a realistic likelihood of "vindictiveness." ' " (*Twiggs, supra*. 34 Cal.3d at p. 369, quoting *Perry, supra*, 417 U.S. at p. 27.) There is no vindictiveness where, as in both *Bordenkircher* and the present case, the prosecutor's intention to increase the severity of the charges " 'was clearly expressed at the outset of the plea negotiations' " and the defendant " 'was thus fully informed of the true terms of the offer when he made his decision to plead not guilty.' " (*Twiggs*, at p. 370, quoting *Bordenkircher, supra*, 434 U.S. at p. 360.) The fact that in this case the additional charges were added after a mistrial and before the subsequent retrial does not change the result, given that the prosecution had informed appellant of the possibility of such charges during plea negotiations that took place well before the prior trial ended in a mistrial. Thus, in this case, unlike *Twiggs*, the prosecutor did not "unilaterally impose[] a penalty *in response* to the defendant's insistence on facing a jury retrial" (*Twiggs*, at p. 371, italics added) because at the time of the offer appellant was not facing a retrial.

For the foregoing reasons, the addition of charges against two additional victims, along the lines described by the district attorney during the March 7, 2016 plea negotiations, did not give rise to a presumption of prosecutorial vindictiveness, and the granting of the People's motion effectuating that amendment did not constitute an abuse

of judicial discretion. Likewise, appellant has not shown that the addition of the prior strike allegations—*before* the first mistrial—constituted prosecutorial vindictiveness.

II. *The Prior Videotaped Statements of A.G. and T.C. Were Properly Admitted*

Appellant claims the admission of videotaped out-of-court statements by A.G and T.C. as prior inconsistent statements and exceptions to the hearsay rule under Evidence Code sections 1235 and 1360 was error.[9]

A.G.'s testimony was highly equivocal. She identified appellant but could not say how she knew him or whether she spent much time with him. She was unable or unwilling to say whether appellant made her feel uncomfortable. While she knew the difference between a "good touch" and a "bad touch," she did not respond to the question whether appellant "would do any bad touch to you," which made her nervous. Nor did A.G. answer when asked by the district attorney whether anyone had ever touched her in a way that made her feel uncomfortable and could not remember whether she had ever sat in appellant's lap. A.G .was also unable to remember her videotaped interview and did not answer when asked whether appellant had taken off her clothes. When asked "is there anything that would help you to be able to talk?" she said "I don't know." She shook her head "from side to side," (indicating "no") when asked if she would like a glass of water or anything like that," and whether it would "be helpful to take a break." On brief cross-examination, A.G. remembered the woman who picked her up the day appellant "went to jail"; but did not remember telling the woman what she called her

[9] Relying on the opinion of the California Supreme Court in *People v. Green* (1969) 70 Cal.2d 654, which dealt with Evidence Code section 1235, appellant also maintains that admission of these out-of-court statements violated his rights to due process of law and confrontation. But appellant acknowledges that that opinion was overruled by the United States Supreme Court in *California v. Green* (1970) 399 U.S. 149, which permits the use of otherwise admissible hearsay testimony in this case. Appellant's real claim is that "*Green v. California* [*sic*] should be overturned," which we cannot do. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Because appellant has provided no additional argument, beyond a conclusory sentence or two, as to why admission of the videotaped interviews under Evidence Code sections 1235 and 1360 violated his federal constitutional rights to due process and confrontation, we will not address those unsupported claims.

private parts. Asked if she remembered telling her mother that "Ms. Wendy told you to lie," A.G. said she did not.

On redirect, after A.G. testified that she was telling the truth, and knew how important it was to do that, the court asked A.G.: "Am I correct that you just don't feel comfortable? You don't want to talk about good touches or bad touches?" A.G. said "yes." With the approval of counsel, the court then thanked A.G. for her testimony and allowed her to leave.

At that point, the district attorney sought leave to admit a videotaped interview with A.G. on the ground of Evidence Code section 1360, which provides that in certain circumstances, "[i]n a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse . . . performed with or on the child by another . . . is not made inadmissible by the hearsay rule . . . ." (Evid. Code, § 1360, subd. (a).)

At a hearing at which the jury was not present, the public defender argued, in effect, that A.G. did not "testify" within the meaning of the statute in that "she wouldn't talk about the alleged offense" and appellant therefore "did not have an opportunity to actually confront and cross-examine her." The district attorney answered that appellant forfeited the objection because "the defense attorney asked a handful of very limited, very circumscribed questions that were designed to help the defense. They could have questioned her about some of these topics. I think they had an obligation to do so if they wanted to raise this objection, and they didn't."

The court found the videotape interview admissible, concluding that, as required by Evidence Code section 1360, "the child did testify" and the "contents and circumstances of that interview . . . had sufficient indicia of reliability." Among other things, the court noted, "nothing in that interview was particularly leading or coercive" and "the defense had an opportunity to cross her. And I think it, again, chose not to ask certain questions." The court concluded that the defense "had those opportunities" to confront A.G.

The court reached the same conclusion with respect to the previously videotaped interview of T.C.

T.C., who was A.G.'s sister, was 9 years old at the time of trial. She knew the difference between the truth and a lie, and that lying was "bad." She testified that when she lived with appellant and her grandmother, she was sometimes alone with appellant but he never touched her in a way that made her uncomfortable or took her clothes off. When asked whether she wanted to talk about Poppa Ray, T.C. said "no" and agreed with the prosecutor's suggestion that this was "because you don't want to be here." She also said there was nothing that would make her more comfortable talking about appellant. Finally, asked whether she had ever told anybody that Poppa Ray had touched her inappropriately, T.C. said: "No." After the public defender said she had no further questions of T.C., the court excused the child.

When the prosecutor moved to admit the videotaped interview of T.C. pursuant to Evidence Code section 1360, the defense objected on the ground that it had no "opportunity to confront her." The public defender argued that "[e]ssentially [T.C.'s] comments were, 'No, no, no, no.' So there was nothing there for the defense to actually elicit from her, quite frankly, or to expound on." The district attorney took the position that T.C's answers to his questions "clearly helped the defense. They were satisfied. They chose not to cross-examine her for strategic reasons. I think they forfeited any claim to a confrontation by omission."

Admitting the videotape, the court explained that T.C.'s testimony at the Evidence Code section 402 hearing (on the issue of her competency to testify) was very reluctant. She refused to fully enter the courtroom and testified while standing near the door, as the court allowed without objection by either party. But she did answer the prosecutor's questions and, "given her age and the nature of the questions, she was competent" to testify. T.C. "knew the difference between the truth and a lie, the importance of telling the truth and answered a series of questions in monosyllabic 'yes' or 'no' " and "answered most of the questions that were proposed to her." "When asked specifically if she knew who Poppa Ray was," and whether he "had touched her inappropriately in any

way, she said no. Her direct testimony ended. I then offered [the public defender] an opportunity to ask questions, and you chose not to. And she was then excused." For these reasons, the court found that T.C. was competent, that she answered questions "to the benefit of the defendant," and that under these circumstances, "the People would be allowed to produce prior inconsistent statement[s] of their witness" pursuant to Evidence Code section 1235, in the form of the videotaped interview."

Reviewing T.C.'s statements during the interview for purposes of Evidence Code section 1360, the court found her to be a minor child under the age of 10 and, the content of the statements and the circumstances in which they were made "provided sufficient indicia of reliability."

The standard of review for rulings on the admissibility of evidence—including the admissibility of prior inconsistent statements under Evidence Code section 1235 and the application of Evidence Code section 1360—is abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007–1008; *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.) Under that standard, "a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113; see *People v. Rowland* (1992) 4 Cal.4th 238, 264.)

First, as to Evidence Code section 1235,[10] appellant argues that the videotaped interviews of A.G. and T.C. cannot be deemed inconsistent with their testimony under oath because neither of them in fact testified at trial.[11] According to appellant, "A.G. gave no testimony relating to the alleged facts of this case, and therefore her forensic

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[10] Evidence Code section 1235 provides in relevant part: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing . . . ."

[11] The People point out that appellant did not object to the admission of A.G.'s videotaped interview on this ground in the trial court. Regardless, as we shall explain, *post*, appellant's claim of inadmissibility under Evidence Code section 1235 is meritless as to either child.

interview was not inconsistent with her testimony under oath. Indeed, her only positive assertion was that she never saw appellant touch anyone else in a way that was a 'bad touch' " so that "her forensic interview was not inconsistent with her testimony on the witness stand." Appellant argues this was also true of T.C., because "she gave no evidence as to any fact" and essentially "refused to testify." Appellant claims that where, as here, "a witness refuses to testify, prior out-of-court statements are inadmissible and a violation of the defendant's confrontation rights."

Appellant's sole authority for this proposition is *People v. Rios* (1985) 163 Cal.App.3d 852 (*Rios*),[12] which held that since the two witnesses in that case gave no actual testimony, there were no statements in the record from which to infer or deduce implied inconsistency for purposes of Evidence Code section 1235. The hearsay statements of the witnesses in *Rios*, which were intended to corroborate accomplice testimony, were originally made to an investigating police officer and, when the witnesses refused to answer any questions at trial, the court concluded that their refusals constituted an evasion or implied denial of their earlier statements. The statements were introduced through the testimony of the investigating officer and the prosecutor's questions of the witnesses themselves, who refused to answer.

The language in *Rios* appellant presumably relies upon is that "a prior statement is not admissible where the record shows no reasonable basis for concluding the witness' responses are evasive and untruthful. [Citations.] While our Supreme Court has not elucidated what kind of record is necessary to support a finding of evasiveness [citation], the appellate courts have consistently applied the rule set forth in *People v. Sam* [(1969) 71 Cal.2d 194, that] there is no 'testimony' from which an inconsistency with any earlier statement may be implied when the witness honestly has no recollection of the facts [or] .

[12] Appellant does say, without elucidation, that we should also "see *People v. Shipe* [(1975)] 49 Cal.App.3d 343; *Douglas v. Alabama* (1965) 380 U.S. 415," but we do not know why. Both cases involve witnesses who refused to testify on Fifth Amendment grounds and neither case relates to the admissibility of evidence under Evidence Code sections 1235 or 1360 or similar statutes.

. . where a witness gives no testimony and refuses to answer all questions." (*Rios, supra,* 163 Cal.App.3d at p. 864.)

Appellant's assertion that *Rios* "is very much in point" is unfathomable. The opinion is manifestly distinguishable. A.G. and T.C. did testify, as Evidence Code section 1235 requires, albeit with considerable concision and reluctance. As the trial court noted, they answered almost all of the questions put to them by the prosecutor. The public defender's decision to forego cross-examination seems to us, as it did to the trial court, obviously strategic, because the minors' testimony was favorable to the defense and further inquiry might prove damaging. Moreover, the evasive testimony of the minors could hardly be more obviously inconsistent with their prior out-of-court statements. Therefore, the court did not abuse its discretion when it found the videotaped interviews admissible under Evidence Code section 1235. (See *People v. Hovarter, supra,* 44 Cal.4th at pp. 1007–1008.)

Second, appellant argues that the videotaped interviews were inadmissible under Evidence Code section 1360[13] because "the children did not testify in any meaningful way, and could not be cross-examined . . . ." As we have already explained, however, both children *did* testify at trial, at which time defense counsel had the opportunity to

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[13] Subdivision (a) of Evidence Code section 1360 provides: "In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

"(1) The statement is not otherwise admissible by statute or court rule.

"(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

"(3) The child either:

"(A) Testifies at the proceedings.

"(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child."

cross-examine them. (See Evid. Code, § 1360, subd. (a)(3)(A).) Hence, the court did not abuse its discretion when it found that the videotaped interviews were admissible pursuant to Evidence Code section 1360. (See *People v. Hovarter*, *supra*, 44 Cal.4th at pp. 1007–1008; compare *People v. Roberto V.*, *supra*, 93 Cal.App.4th at p. 1356 [holding that where alleged victim did not testify, "because neither the notice nor the unavailability requirement was met, the challenged hearsay statements were not properly admitted pursuant to Evidence Code section 1360," and, "[m]oreover, because there was an insufficient showing that the statements were reliable, their admission violated appellant's rights under the confrontation clause of the United States Constitution, requiring reversal"].)

DISPOSITION

For the foregoing reasons, the judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Stewart, J.

_____
Miller, J.

People v. Thompkins. (A152363)